should be awarded only one-third of his damages. *Oppenheim* v. *The Lackawanna,* U. S. Dist. Ct. S. D. N. Y. Feb. 1907.

Thus the exceptional rule of the early maritime codes in favor of parties to a collision, which was later restricted to collisions from mutual negligence, and then broadened from collisions to a general rule for the entire field of maritime torts, has in its final stage witnessed a return to the original practice of discretionary apportionment, which was abandoned as impracticable in the collision cases. The method has been frequently criticized on this score, and it is said not to have proved a good working rule in those States where, apart from admiralty, it has been adopted by statute. Burdick on Torts, 440 and notes; Wood, Railroads, 1506. This is not surprising when one considers the difficulty of establishing and applying a comparative scale of negligence. It is doubtful whether its acceptance in cases of personal injury will lead to the abandonment of the more arbitrary rule of equal division in the collision cases, even in those courts which admit that the same doctrine underlies both classes.

TORT LIABILITY OF CHARITABLE INSTITUTIONS.—In recent years there has been in the United States a continual succession of decisions involving the tort liability of charitable institutions. They have in the main been confined in their facts to cases of a beneficiary, paying or non-paying, of such an institution, suing it for an injury caused by the negligent act of an ordinary servant, an injury which would in the case of an ordinary person, corporate or natural, be considered a breach of the duty arising from the doctrine of respondeat superior. The unanimity of opinion exempts the charity in such cases. 1 COLUMBIA LAW REVIEW 485; *Parks* v. *N. W. Univ.* (1905) 218 Ill. 381. In only one case of this nature did the facts involve exemption from a more extensive duty—that of *Downes* v. *Harper Hospital* (1894) 101 Mich. 555, in which the corporation was exempted from the duty of providing a safe place for one of its patients who was injured through the failure of the managers to make such provision. The case, however, does not seem to recognize the distinction between such a duty, a failure in which would ordinarily constitute corporate negligence, and the other duty by which the negligence of a servant is imputed to the corporation, but rests its decision on the broad ground of non-liability for the tortious acts of servants. The case of *Fire Ins. Patrol* v. *Boyd* (1888) 120 Pa. 624, does also, it is true, involve the question of a more extensive exemption than that above stated, the injured party being a third person and not a beneficiary, but the decision is partly put on the ground that the institution was of a class well recognized as governmental agencies, as to whom the doctrine of respondeat superior is entirely inapplicable for distinct reasons. Burdick on Torts 113. It is hard to see why any other ground was sought, and the authorities cited for its exemption as a charitable institution are almost exclusively cases involving the former question. The case cannot, therefore, be considered as an authority for the proposition advanced.

In view of the narrowness of the actual decisions in the past it is necessary, in order to determine whether the same result should logically

be reached in cases involving different issues, to determine the basis upon which the exception rests by an examination of the reasoning and dicta contained in the decisions. Three apparently distinct theories have been advanced. By one set of cases the theory advanced is the absolute inviolability of the trust funds, held by these institutions. *Perry* v. *House of Refuge* (1884) 63 Md. 20; *Haas* v. *Missionary Society* (1893) 6 N. Y. Misc. 281; see also *Fire Ins. Patrol* v. *Boyd*, supra. This doctrine has, however, been denied in at least two cases, *Hearns* v. *Waterbury Hospital* (1895) 66 Conn. 98; *Powers* v. *Mass. Hom. Hospital* (1901) 109 Fed. 294, though the courts seemingly did not agree in the theories respectively advanced. The Connecticut court bases the non-liability on the inapplicability of the arbitrary doctrine of respondeat superior to such cases. The principle is derived from the opinion that, while the corporate trust funds should be liable for torts which are due to the corporation's lack of care, they should not be mulcted for acts over which the corporation, as such, has no direction, the personal wrongful neglect of a servant whom it has selected with due care. The opinion contains an intimation that its contention would be even stronger if the exemption was confined to cases, where, as here, a beneficiary is the injured party, a limitation which is intimated in other opinions. *Corbett* v. *St. Vincent's School* (N. Y. 1903) 79 App. Div. 334; *Parks* v. *N. W. Univ.*, supra. The opinion of Judge Lowell in the federal case, while viewing the situation from a different standpoint, will, if also taken with the intimation contained therein, be seen to impose similar limitations to that suggested in the Connecticut case. The main burden of the opinion is that the exemption of a charitable institution from liability can only be based on the theory of an assumption of risk by the beneficiary, a theory which at first blush might seem to exempt the institutions in all cases where the beneficiary is the injured party whether there be corporate negligence or not. On closer examination, however, the opinion will be seen to contain the intimation that the assumption is confined to risks of the personal negligence of servants and not of corporate negligence. The two cases can then be said to restrict the exemption to the limits of previously decided cases, a beneficiary suing for the personal negligence of a servant.

Three recently decided cases, involving more extensive issues than have previously been presented, are interesting as respectively adopting each of the above theories and applying them to the question in issue. In *Hewett* v. *Association* (1906) 73 N. H. 556, a charitable corporation was held liable to a nurse for the injury caused her by the failure of its manager to inform her of the contagious character of a patient's disease. The court expressly adopting the doctrine of *Hearns* v. *Waterbury Hospital*, supra, distinguishes the non-delegable duty in which the corporation has failed, of exercising due care to servants and the duty arising from the doctrine of respondeat superior, holding the non-liability of charities extends to the latter but not to the former duty. In Missouri, on the other hand, a hospital was held exempt from liability to a patient, not only for the personal negligence of a nurse, but also "for its own negligence in selecting an incompetent employee." *Adams* v. *University Hospital* (1907) 99 S. W. 453. The result reached, though opposed to

dicta in a number of previous cases, *McDonald* v. *Mass. Gen. Hospital* (1876) 120 Mass. 432; *Union Pac. Ry.* v. *Artist* (1894) 60 Fed. 365; *Van Tassel* v. *Manhattan Hospital* (1891) 15 N. Y. Supp. 621, is a logical application of the first doctrine outlined above [of the absolute inviolability of trust funds], and the case is especially interesting because of the recognition by the court of the distinction not seen in *Downes* v. *Harper Hospital*, supra, between corporate negligence and that of servants. The reasoning of the court would go so far as to exempt a charity from liability for all torts of whatever nature. In Michigan the *Downes* case has been expressly limited by an application in a recent decision of the rule laid down in *Powers* v. *Mass. Hom. Hospital*, supra. *Bruce* v. *Central etc. Church* (1907) 110 N. W. 951. It was held that a charitable institution was liable to the employee of a contractor for an injury caused by a defect in a scaffold furnished by the institution. The court determines "that the principle of non-liability recongized in the *Downes* case is limited in its application to those who are beneficiaries of a charitable trust." The situation in Michigan would, therefore, seem to be that a corporation is exempt from all liability, to a beneficiary, in tort, but liable in all cases to third parties. All three cases are especially interesting as involving the question of the exemption of charitable corporations from duties, a failure in which would ordinarily constitute corporate negligence. See Burdick on Torts 115, 116. The result reached in the Missouri case in holding the corporation exempt in such a case is directly supported in the United States only by the *Downes* case and its theoretical basis, the inviolability of charitable trust funds, has been successfully assailed. *Powers* v. *Mass. Hom. Hospital*, supra, 300 et seq.; see 1 COLUMBIA LAW REVIEW 485; 9 Harv. Law Rev. 543. Discarding the unlimited rule of this case and even the narrower rule of the Michigan courts, and adopting the general theory advanced by the *Hearns* case and applied by the first principal case, that the exemption is based on an exception to the rule of respondent superior, *Corbett* v. *St. Vincent's School*, supra (semble); see 1 COLUMBIA LAW REVIEW 485; 12 Harv. Law Rev. 128, the question still remains whether the further limitation derived from Lowell's opinion shall be applied; or shall a charitable institution, like a government body, be exempt to a third person as well as to a beneficiary for the personal negligence of servants. The only case, *Fire Ins. Patrol* v. *Boyd*, supra, directly answering this question in its opinion was one where the institution was admittedly a governmental body and therefore is not authoritative. The intimations in other cases seem to favor the limitation.

APPLICATION OF INSURANCE MONEY TO INTEREST ON MORTGAGE.—In view of the generally recognized rule that the proceeds of insurance effected by the mortgagor for the benefit of the mortgagee take the place of the security, *Gordon* v. *Ware Savings Bank* (1874) 115 Mass. 588; *Connecticut Insurance Co.* v. *Scammon* (1880) 4 Fed. 263; *Fergus* v. *Wilmarth* (1886) 117 Ill. 542; *Naquin* v. *Texas Investment Association* (1902) 95 Tex. 313, the question raised by a recent case in Vermont is an interesting one. A $1200 mortgage for six years at 6 per cent. was given on property insured by the mortgagor for the benefit of the mortgagee. The first year's interest was paid, and shortly thereafter, on a partial